CORRESPONDENCE.

Limitation by Contract of Carrier's Liability.

Editor "Virginia Law Register:"

In deciding the case of C. & O. Ry. Co. *v.* Pew (as reported in 64 S. E. 33), the Supreme Court of Appeals has provided the last straw to break the back of the railroad camel.

A railway company is unquestionably a common carrier, but the common carrier known to the common law was not a present day railway company. The theory of the common law was, that the carrier was to be regarded as a practical insurer of the consignments, against all loss except such as was caused by the act of God, or by the public enemy. This was deemed necessary, because at that stage of society, naturally, there existed a crude system of carriage, often conducted by unscrupulous, irresponsible agencies, and the apparent necessities of the case dictated the policy of the law. Gradually, by its impracticability, the rigor of the common-law rule was modified, to the extent that the carrier was not held liable as an insurer against acts arising from the public authority, those arising from the act of the shipper, and those arising from the inherent nature of the goods.

With the advance of society, and the growing necessity for adequate transportation facilities, it was found impracticable to arbitrarily hold a carrier absolutely to this liability as, naturally, no one cared to make a large investment in a transportation enterprise if it were liable to such predatory claims under sanction of law. Therefore the law early recognized the right of the carrier to limit this liability by contract. As was well said in Michigan Central R. R. Co. *v.* Hale, 6 Mich. 243: "The law does not compel persons dealing with common carriers to rely and insist upon the liability which, in the absence of special contract, it imposes in their favor, but recognizes their competency to manage their own affairs and to make such contracts with respect thereto as they deem most conducive to their own interests."

Where such liability is thus limited by contract, a mutual advantage is gained by shipper and carrier; the former receiving a lower rate in consideration of his contract, the latter being by the terms of the contract relieved from the troublesome liability as an insurer.

In many states (as in Virginia) the carrier is not permitted to limit its liability against its own negligence. While it takes no argument to convince a man familiar with and interested in industrial development (necessarily correlative to railroad development) that the case of Hart *v.* Penna. R. R., 112 U. S. 331, expresses the sound rule, rather than our Virginia case of C. & O. Ry. *v.* Beasley Couch & Co., 104 Va. 788, the point involved in these cases (the right of a common carrier to limit its liability against its own negligence) is aside from the discussion of the case just decided, except incidentally.

The present case of C. & O. Ry. Co. *v.* Pew construes the following language of § 1294c (24) of the Code: "No contract, receipt, rule, or regulation, shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into." For the purposes of this communication, I do not care to discuss the difference between exempting from liability, and limitation of liability. The language quoted is the wording of the last few lines of the first paragraph of this sub-section, but the matter which precedes it, and to which it necessarily refers, is all based upon the negligence of the carrier. With all due respect to the court in its statement that: "Our conclusion is that, so far as the rights and liability of an initial carrier with respect to goods lost on its own line is concerned, there is no difference in legal effect between a liability arising under the last sentence of the first paragraph of § 1294c (24), and under 1294c (25), except, of course, that liability under the latter clause is predicated on the negligence of the carrier, while under the former it is not. That is to say, a common carrier can no more exempt itself by contract from liability for loss or injury to goods committed to it for transportation in the one instance than in the other," I submit that the wording above quoted of the last few lines of the first paragraph of sub-section 1294c (24), is governed by the condition precedent of negligence on the part of the carrier.

The traveler who, after exchanging the luxurious and efficient railway service of the business states for the uncomfortable and inadequate "Virginia creepers" need look no further for an explanation than to the failure of the legislative branch of the state to check the effect of such decisions as that just handed down by our Supreme Court of Appeals in construing this section of the code, made possible by the construction given in the former case of C. & O. Ry. Co. *v.* Beasley, etc., ante.

J. AUGUST GOERDELER.

Norfolk, Va., April 20, 1909.

[Ed. note.—See note to Chesapeake & O. Ry. Co. *v.* Pew, ante, p. 139.]